93-853

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

V.

ROBERT E. KINGMAN,
RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MAINE

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## APPENDIX OF PETITIONER
VOLUME 1

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## APPENDIX


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## I. SUPREME COURT OF MAINE

MOTION FOR EXPEDITED BRIEFING,
ROWLAND, MARCH 1993

| | |
|---|---|
| STATE OF MAINE | SUPREME JUDICIAL COURT SITTING AS THE LAW COURT DOCKET NO. CUM-92-525 |

MARGARET S. ROWLAND, )
Plaintiff/ )
Appellant )
)
v. )
)
ROBERT E. KINGMAN, )
Defendant/ )
Appellee )

**MOTION FOR EXPEDITED BRIEFING SCHEDULE**

Pursuant to Maine Rule of Civil Procedure 75B(b), Plaintiff/Appellant Margaret S. Rowland hereby moves this Court to order an expedited briefing schedule in this matter. The grounds for this motion are as follows:

1. This action involves Plaintiff's appeal from an Order entered by the Superior Court on November 19, 1992 (Cumberland Co., *Beaudoin, J.*). That Order granted Plaintiff and her former husband shared parental rights and responsibilities for the couple's two children, Edwin (d.o.b. 1/13/83) and Meagan (d.o.b. 4/17/85) and gave Plaintiff primary physical custody of the children. The award to Plaintiff of primary physical custody of the children, however, was conditioned upon her promise to remain in Yarmouth, Maine.

2. As set forth in the Affidavit attached hereto as Exhibit A (Rowland) and B (LaFrance), the Plaintiff now

resides with the children in Yarmouth, Maine, is underemployed and the children have a single parent household; her husband lives and works in Portland, Oregon where he has been for ten years; her husband, despite a two year search, has been unable to find suitable employment in Maine in spite of his willingness to give up a tenured position and to take a significant cut in pay; the family life has deteriorated from what it once was and the persons affected by the lower court's decision are unable to effectively plan their lives until the Law Court decides this appeal.

3. In this appeal, Plaintiff seeks to have this Court vacate the Superior Court's Order restricting her

and the children to Yarmouth, Maine and to allow her to retain primary physical custody of her children even if she moves.

4. As set forth in the briefing schedule that is attached as Exhibit C, this matter is currently scheduled for argument during this Court's June Term. If a ruling by this Court or if on remand a ruling by the lower court is not issued until after the academic year begins in September 1993, it is possible that Plaintiff will be forced to remove her children from school in Yarmouth in the middle of the academic year, causing them unnecessary disruption.

WHEREFORE, Plaintiff/Appellant Margaret Rowland respectfully requests

that this Court issue an expedited briefing schedule in this appeal to allow the matter to be heard during either this Court's April or May Terms. Plaintiff proposes that she serve her brief on Defendant/Appellee Robert E. Kingman no later than March 3, 1993; that Defendant be required to serve his brief on plaintiff within 30 days or no later than April 2, 1993, without opportunity for extension; and that Plaintiff serve her reply brief on Defendant within 7 days of the service of Defendant's brief or no later than April 9, 1993.

Dated: March 2, 1993

/s/ E. Stephen Murray, Esq.

/s/ Ann M. Courtney, Esq.
Attorneys for Plaintiff/Appellant

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ROWLAND AFFIDAVIT

EXHIBIT A

| | |
|---|---|
| STATE OF MAINE | SUPREME JUDICIAL COURT<br>DOCKET NO.<br>CUM-92-525 |

MARGARET S. ROWLAND, )
Plaintiff )
)
v. )
)
ROBERT E. KINGMAN, )
Defendant )

**AFFIDAVIT OF**
**MARGARET S. ROWLAND, M.D.**

I, Margaret S. Rowland, M.D., being duly sworn, depose and state as follows:

1. I am Margaret S. Rowland, M.D., the plaintiff in the above entitled case.

2. I currently reside at 41 Oakwood Drive, Yarmouth, Maine.

3. My husband, Professor Arthur B. LaFrance resides in our home in Lake Oswego, Oregon.

4. I am living in Yarmouth in compliance with Judge Beaudoin's order of November 19, 1992 to be able to maintain custody of my children, Edwin and Meagan Rowland Kingman.

5. Judge Beaudoin's Order has had a profound impact on my life in a number of different ways including financially and emotionally.

6. On June 14, 1992, Professor LaFrance and I were married. We had carefully planned and were looking forward to a life together with our children in Lake Oswego, Oregon:

a. We had purchased and jointly own a 10 room home in a

neighborhood of like homes in Lake Oswego;

b. I had an offer of part time employment from the Tigard Family Medical Group in Tigard, Oregon which offered a starting salary of $35,000 plus benefits and which would allow me to be at home with the children after school with no night call and limited weekend hours.

7. Even though I am legally married, one effect of Judge Beaudoin's Order is to effectively preclude a marriage. My primary relationship with my husband is, by necessity, through phone calls. I am able to visit with my husband only infrequently as schedules and finances

allow for periods of usually a week and rarely a month at a time. As a result, when he visits in our home in Yarmouth, his role there as husband and stepfather is unclear and poorly defined. The children and I must constantly adjust to his presence and, as that adjustment is being made, he must again leave. Not only is he unable to establish himself as a true member of our family, he is also unable to establish himself as a true member of the community and consequently, he and I are unable to establish ourselves as a couple in the community. Similarly, my presence in Oregon is one of slightly more than visitor. He and I do not have joint community involvement there, either.

8. I am a family physician and was actively in practice in Yarmouth as such for twelve years and had a large, well established practice.

9. I gave up my medical practice as of August 1, 1992 in anticipation of a move to Oregon. This required months of preparation and termination with my patients.

10. My medical practice is no longer available to me in Yarmouth. the group with which I practiced no longer has space available for me.

11. It is not possible, given the uncertain nature of my current circumstances, to reestablish a practice in Yarmouth. the large costs involved in terms of finding space, hiring office staff, buying medical

supplies and equipment and buying office equipment, require a minimum of a three to five year commitment to be financially feasible. Given the pending appeal in this case, it would not only be financially untenable but it would also be unfair and cruel to ask my patients to return to me if I cannot make a long term commitment to provide their medical care. My identity in this town, therefore, has been dramatically altered as has my identity in the greater medical community. My sense of community in Yarmouth no longer exists as it did previously.

12. I have managed to find employment as a consultant to Healthsource Maine, Inc. -- a

physician owned HMO insurance company. I do not have consistent office space available to me there and, consequently, no longer enjoy the normal interpersonal working relationships that I did previously. This is yet another aspect of the isolating impact of Judge Beaudoin's order.

13. The potentially tenuous nature of my presence in Yarmouth has impacted also at my church. I had been asked to be a member of the Trustees, yet when my legal situation was understood, that offer was withdrawn.

14. My life in Yarmouth, therefore, exists on a day to day basis, without the sense of forward

motion, with changed relationships with others in the town. My community here, as it was last year, no longer exists. My life here is much more isolated and isolating than it was previously.

15. There is a significant financial impact as a result of Judge Beaudoin's order. My income from my practice was approximately $85,000 annually. My children and I were, therefore, able to enjoy a comfortable life style. I am currently paid $30 an hour for the work I do as a consultant for Healthsource Maine. I do not receive any benefits. Since beginning work there, I have managed to earn an average of $770 weekly or an estimated taxable annual income of

approximately $36,900. As long as Judge beaudoin's order remains in effect, Professor LaFrance and I will be in the position of having to maintain two homes, with two mortgages and associated costs. We, to be able to see each other, must and will continue to incur substantial travel expenses. Our telephone bills are and will continue to be significant. Monies that had been earmarked for the children's future education are in jeopardy. I am no longer able to provide the same lifestyle or experiences for myself or my children. Skiing, new clothing, housecleaning and snowplowing services have, as but examples, been unaffordable expenses this year and will continue to be

unaffordable as long as Judge Beaudoin's order is in effect. Whereas I had reached a comfortable financial situation both for the present and the future, cost is now a daily concern. My ability to maintain this home and neighborhood for myself and my children is in jeopardy. Yet, Judge Beaudoin's order will not allow me to move from the town of Yarmouth without the almost certain loss of custody of my children.

16. There is significant emotional impact for myself and my children by being forced to remain in the "single parent" role. This impact is enhanced by the knowledge that I had created a viable, loving, two adult home situation for my children.

It is deeply painful to live with the knowledge that the Court has imposed a single parent home on Eddie and Meagan. They will, therefore, grow up with the knowledge of this as normal. They have been denied the experience of modeling provided by two loving adults sharing the same household -- the so-called "intact family" that has become so rare in our society. How can they be expected to be able to form loving, sustaining, adult relationships when they have been denied the opportunity to experience that as children? through its Order, the Court has also forced weekly, if not almost daily contact between myself and Mr. Kingman. This is an experience that I find extremely

stressful as the issues that led to our divorce remain largely unresolved. Though I try to keep the children as uninvolved in the animosities that exist as is possible, it is obvious that they are aware of them. I watch them go literally back and forth between us when we are present at public events, such as hockey games or Cub Scout Den meetings together. I can't believe that it is in their best interests to have to do so and it is chronically painful for me to watch this behavior.

17. Professor LaFrance and I have been married since last June. Prior to our marriage, we, and the children, would often focus our conversations on things we would plan

to do as a family, future goals that we had, trips we would take, and plans for our future together. He and I must now focus instead on ongoing legal battles. We don't know if there will be a future allowed us. I must choose between having a husband or having my children. I worry about whether or not my husband and I will ever be able to move beyond court battles and legal maneuverings or if the corrosive effects of this Order and its implications will leave us both financially and emotionally bankrupt. The long term survival of our marriage is in jeopardy as a result of the Order.

18. The Order has effectively imprisoned me without walls. I am

unable to move from this town, even though the community and financial stability that were once here for me no longer exist. I have a husband, yet am not allowed a marriage. My children have a stepfather, yet are denied an ongoing male presence in their home. I am unable to fully participate in my children's activities or in activities for myself both because of the uncertain nature of my future and because of my commitment to try to spend time with my husband.

19. I have been the primary parent -- emotionally, spiritually, and financially -- for Eddie and Meagan both during and since my marriage to their father. To live

within the terms of Judge Beaudoin's Order I am faced with an impossible choice. I can either choose to remain as the primary parent for my children or I can enjoy the freedoms that I never before questioned -- the freedom to marry and live with the man I love, the freedom to choose the community within which I shall live, the freedom to pursue the job of my choosing, the freedom to make my own decisions about my life. Since I cannot abandon my children, there is, in effect, no choice available to me.

Dated at Yarmouth, Maine this 10th day of February, 1993.

/s/ Margaret S. Rowland, M.D.

STATE OF MAINE
CUMBERLAND, ss. February 10, 1993

Personally appeared the above-named Margaret S. Rowland, M.D. and made oath that the foregoing statements by her are made on personal knowledge and are true.

/s/ E. Stephen Murray
Attorney at Law

LaFRANCE AFFIDAVIT

EXHIBIT B

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-92-525

MARGARET S. ROWLAND, M.D.
Plaintiff/Appellant

v.

ROBERT E. KINGMAN,
Defendant/Appellee

AFFIDAVIT OF ARTHUR B. LaFRANCE

I, Arthur B. LaFrance, hereby submit this affidavit in connection with the above-captioned proceeding:

1. I have lived and worked as a dean and tenured law professor in Lake Oswego since 1982, where I have strong ties to the community.

2. On June 14, 1992, after a courtship of nearly three years, about which Mr. Kingman knew, I married

Margaret Rowland in Yarmouth, Maine.

3. After an unsuccessful two year search to find employment in Maine, I, and my new wife, Margaret, concluded that we had no realistic choice but to live in Oregon where I could continue my employment and Margaret could work part-time and care for her children at all times when they were not in school.

4. To that end, Margaret and I bought a house in Lake Oswego, Oregon, Margaret secured a part-time job in the medical community, gave up her medical practice in Yarmouth, Maine and put her home in Yarmouth up for sale.

5. On August 17, 1992, and again on November 19, 1992, the Maine Court

concluded that Margaret and the children had to stay in Yarmouth, Maine presumably until Meagan, age 7, reaches age 18.

6. I now live alone in our ten room house, 3,000 miles from my wife and her children who are forced to live in a single parent home in Yarmouth, Maine, where I see them at uncertain intervals as my employment permits, with my arrivals and departures attended by the disruption of both their home and my own separate living requirements, leaving me unable effectively to maintain professional relationships, friends, church affiliations or recreation in conventional terms in either Oregon or Maine.

7. This has seriously disrupted my professional commitments and relations, impairing my performance as a law teacher, and causing me to withdraw from service as a part-time judge, from certain Bar Association commitments, from Law School Committees and responsibilities and from several scholarly commitments or academic deadlines, all of which require stability, continuity of presence, and continuous proximity to Law School resources for their success.

8. I now travel as often as I can to see my wife and her children, often at the expense of professional obligations at my law school, under scheduling which permits only short-

term visits and precludes long-range planning, leading to fatigue and disorientation.

9. Financially, the lower court's order has required creating two different households at an added expense of approximately $2,000 per month, and additional travel and communications of approximately $500 per month, at a time when my wife had closed her medical practice with a loss of income approximating $2,000 per month, for a total cost to us of approximately $50,000 per year, an amount which is destroying our savings, for present family purposes and for our children's future educations.

10. To this must be added the cost of legal fees totaling some $40,000 necessitated by the intrusive and confusing orders of the Court below, beginning with a divorce judgment which put no restrictions on my wife's custody of her children and followed by three subsequent orders which still do not provide the guidance needed to tell us when and where or if we may ever live as a family again.

11. I am not a wealthy man and have always provided for my family from my own earnings, but now I find I am having to borrow even to meet living expenses. The lower court order means I have little prospect of leaving any estate for my own three

children and grandchildren.

12. Emotionally, the lower court's order has meant that my stepchildren, my wife and I have lost the daily love, sharing and mutual support a family provides, replacing those bonds of affection with a sense of loneliness and injustice which is unremitting in its burden and extent -- and which may ultimately destroy our marriage.

13. To this is added the daily indignity of knowing that the trial court has granted to my wife's former husband greater contact with my wife than I have as her husband, and far greater control that I would even desire.

14. I have prepared and submitted this affidavit in response to request by counsel in furtherance of this appeal and do attest to the truth of its contents.

Dated: Feb. 23, 1993

/s/ Arthur B. LaFrance

STATE OF OREGON
COUNTY OF MULTNOMAH

Personally appeared before me the above-named Arthur B. LaFrance and made oath that the foregoing statements by him are made on personal knowledge and are true.

/s/ George H. Pike
Notary Public

OPINION OF THE MAINE SUPREME COURT, AUGUST, 11, 1993

Margaret S. ROWLAND
v.
Robert E. KINGMAN.

Supreme Judicial Court of Maine
Argued May 13, 1993.
Decided Aug. 11, 1993.

Ann M. Courtney, E. Stephen Murray (orally), Murray, Plumb & Murray, Portland, for plaintiff.

Clarke C. Hambley (orally), Elizabeth J. Scheffee, Givertz, Lunt, Hambley & Scheffee, Portland, for defendant.

Before WATHEN, C.J., and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, RUDMAN and DANA, JJ.

GLASSMAN, Justice.

Both the plaintiff, Margaret S. Rowland, and the defendant, Robert E.

Kingman, appeal from a judgment entered in the Superior Court (Cumberland County, Beaudoin, J. (sitting in the Superior Court)), amending the provisions of their divorce judgment relating to the primary physical residence of and support for their two minor children. Finding no error in the record, we affirm the judgment.

The record reflects the following: On May 6, 1991, Rowland and Kingman obtained a divorce judgment providing that the primary physical residence of their two minor children, Edwin and Meagan, be with Rowland; that parental rights and responsibilities be shared by Rowland and Kingman; and that Kingman pay

child support to Rowland. Following the divorce, Rowland remained with the children at the family home in Yarmouth, where she maintained her medical practice, and Kingman moved to Winslow. Rowland subsequently remarried and began planning to move to Oregon where her husband was located. In March 1992, Kingman filed a motion to modify the divorce judgment to change the primary physical residence of the children to be with Kingman and to amend the child support provision should Rowland move to Oregon. In early August, pending a final hearing on Kingman's motion, there was a hearing before the court on the limited issue of whether the children would travel to Oregon with

Rowland on August 24, the date of Rowland's intended move. On August 17, the trial court issued an order providing that if Rowland moved to Oregon the primary physical residence of the children would shift to Kingman, on the condition that he reside in Yarmouth.

As a consequence of the August 17 order, Kingman located several potential homes in Yarmouth. Because Kingman wanted to know whether he should sign a lease, he asked Rowland directly about her plans to move to Oregon. Rowland replied that "if I need to stay in Maine to keep my children, I will." When Kingman later attempted to verify his next visitation period with the children,

Rowland did not inform him that because of the planned move the visit would be impossible. When Edwin asked Rowland if his father knew they were going to Oregon, Rowland replied that Kingman "knew of the plane tickets." Rowland took the children to Oregon on August 24. Kingman was advised of the move on the following day.

In response to Kingman's ex parte motion, the August 27 order of the trial court (Cleaves, J. (sitting int he Superior Court)) provided, inter alia, for the issuance of a writ of habeas corpus for the return of the children to Kingman and granted Kingman sole parental rights and responsibilities of the parties' children until further order of the

court. Kingman flew to Oregon and returned with the children to Yarmouth where he had rented an apartment.

In September 1992, the court held a hearing on all outstanding motions in this matter, including Kingman's original motion to modify the divorce judgment and Rowland's motions for findings of fact and conclusions of law regarding the August 17 order and reconsideration of that order, and her motion to vacate the August 27 order. By its order dated November 19, 1992, the trial court, inter alia, provided that the primary physical residence of the children be with Rowland if she resided in Yarmouth, but should Rowland move to Oregon the children's primary physical residence would be

with Kingman on the condition that Kingman reside in Yarmouth; that the parents have shared parental rights and responsibilities, except Kingman would have the sole right to determine day care issues for the children; and that Kingman's child support obligation be increased. It is from this judgment that the parties appeal.

Rowland first contends that the trial court committed an error of law in its determination relating to the best interests of the children by failing to afford an appropriate level of deference to her decision, as the parent with whom the children had their primary physical residence, that it was in the best interests of the children to reside with her in Oregon.

She argues that such parent should be permitted to decide where that parent and any minor children will reside, and that decision should be disregarded by the court only when it would present a clear danger to the children's well being. We disagree.[1]

By P.L. 1987, ch. 721, 19 M.R.S.A. § 752(12), amended by P.L. 1987, ch. 179, § 3, was repealed and replaced by the following provision:

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[1] Rowland also argues that the judgment violated her constitutional rights to travel and marital privacy. Because these arguments were not made before the trial court, they are not cognizable on appeal. Morris v. Resolution Trust Corp., 622 A.2d 708, 712 n.2 (Me.1993).

The relocation, or intended relocation, of a child resident in this State to another state by a parent, when the other parent is a resident in this State and there exists an award of shared or allocated parental rights and responsibilities concerning the child, is a substantial change in circumstances.

See 19 M.R.S.A. § 752(12) (Supp.1992). It is not disputed that Rowland intended to relocate the children to Oregon. Pursuant to section 752(12) this intended relocation was a substantial change in circumstances that on a proper motion by either party warranted a review by the court of any previous arrangement of parental rights and responsibili-

ties with respect to a minor child. We have previously stated:

> [T]he question that the court must first consider on a motion to modify a custody arrangement is whether there "[h]as occurred since the prior custody order a change in circumstances sufficiently substantial in its effect upon the best interests of the children as to justify a modification of the custody arrangement."

Ehrlich v. Bloom, 585 A.2d 809, 812 (Me.1991) (quoting Villa v. Smith, 534 A.2d 1310, 1312 (Me.1987)), cert. denied, ___ U.S. ___, 112 S. Ct. 201, 116 L.Ed.2d 160 (1991).

Factors to be considered by the court in applying the standard of the

best interest of the child are set forth in section 752(5). The provisions of section 725(5) do not foreclose the court's consideration of either parent's decision relating to the residence of that parent and any minor child. However, we find nothing in the statutes governing parental rights and responsibilities with respect to a minor child of divorced parents, or in our case law to support Rowland's contention that the court should defer to the decision of that parent with whom the child has primary physical residence in determining the best interests of that minor child.[2]

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[2] 19 M.R.S.A. § 752(5) (Supp.1992) provides:

> The court, in making an award of parental rights and

responsibilities with respect to a minor child, shall apply the standard of the best interest of the child. In applying this standard, the court shall consider the following factors:

A. The age of the child;

B. The relationship of the child with the child's parents and any other persons who may significantly affect the child's welfare;

C. The preference of the child, if old enough to express a meaningful preference;

D. The duration and adequacy of the child's current living arrangements and the desirability of maintaining continuity;

E. The stability of any proposed living arrangements for the child;

F. The motivation of the parties involved and their capacities to give the child love, affection and guidance;

G. The child's adjustment to the child's present home, school and community;

Rowland also contends that the trial court abused its discretion by ordering that the primary physical residence of the children be with

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> H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent, including physical access;
> I. The capacity of each parent to cooperate or to learn to cooperate in child care;
> J. Methods for assisting parental cooperation and resolving disputes and each parent's willingness to use those methods;
> K. The effect on the child if one parent has sole authority over the child's upbringing;
> K-1. The existence of a history of domestic abuse between the parents; and
> L. All other factors having a reasonable bearing on the physical and psychological well-being of the child.

Kingman if Rowland moved to Oregon. Here, the trial court found that Rowland's intended move to Oregon would constitute a change in circumstances substantially affecting the children's best interests. See Villa, 534 A.2d at 1312. Consequently, the court provided that the primary physical residence of the children would remain with Rowland if she remained in Yarmouth, however, should she move to Oregon the best interests of the children would be served by the children's primary physical residence being with Kingman on the condition that he reside with the children in Yarmouth. the court in its order specifically stated that because Rowland had testified several

times that it would not occur, the court did not address the issue of parental contact should Rowland move to Oregon.

In Boutin v. Dionne, 458 A.2d 426 (Me.1983), we stated:

> The legal principles [applicable in the appellate review of a custody arrangement] are well established and well known. In connection with both the original divorce judgment and later motions for change of custody, the sensitive questions relating to the upbringing of minor children of the divorced couple must of necessity be committed to the sound judgment of the trial judge who hears the witnesses who describe the relevant circumstances of the particular case.

Id. at 426. The trial court's "decision to modify a custody order will only be disturbed if the factual findings on which it is based are clearly erroneous or if it has abused its discretion crafting the new order." Ehrlich, 585 A.2d at 812.

The trial court had before it the following evidence: The children are currently well adjusted to their environment. They maintain frequent and positive contact with Kingman, who has actively sought a significant role as a caring and supportive father in their lives. They would suffer equally from being distant from either parent. Kingman is quite capable of performing as the custodial parent and is willing to do so in Yarmouth, where

the children would greatly benefit from the continuity of locale, routine, community, and schooling. Edwin, a particularly introverted child, is emotionally vulnerable to the disruption of his surroundings at this point in his development and would experience great difficulty in adjusting to a move to Oregon. The children expressed a meaningful desire to stay in Yarmouth. Furthermore, there was evidence before the court that Kingman is the parent better able to foster contact between the children and the other parent and resolve disputes with the other parent in an appropriate manner. Based on the record before us and the best interests considerations mandated in

19 M.R.S.A. § 752(5), we cannot say that the trial court's findings are clearly erroneous or that its amendment of the divorce judgment as it relates to the primary physical residence of the children constitutes an abuse of discretion.[3]

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[3] Rowland also contends in her appeal that the finding of the trial court in its August 27, 1992 order that she was in contempt of its August 17 order for taking the children to Oregon was in error. This contempt finding had no independent practical effect; the trial court's August 27 order awarded Kingman expenses for bringing the children back to Maine and attorney fees. These awards are supportable without reference to the contempt finding. See 19 M.R.S.A. § 752(12) (court may employ any compulsory process it deems proper to enforce powers given under Title 19 "on which costs shall be taxed as in other actions"). By moving the children to Oregon, Rowland caused Kingman to incur the expenses of enforcing the court's August 17 order. An award to

Judgment affirmed.

WATHEN, C.J., and COLLINS, RUDMAN and DANA, JJ., concurring.

CLIFFORD, Justice, with whom ROBERTS, Justice, joins, dissenting.

Because the Court's decision places undue emphasis on the current residence of the children by requiring that their primary residence be in the Town of Yarmouth, a location where

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Kingman of fees and expenses, in this context, is not an abuse of discretion. See Most v. Most, 477 A.2d 250, 263-64 (Me.1984) (divorce court has inherent powers to enforce its orders); Finn v. Finn, 534 A.2d 966, 968-69 (Me.1987) (trial court's award of fees and costs reviewable for abuse of discretion). Since the contempt finding has no practical effect, the issue of its propriety is moot, and we need not address it. Shapiro Bros. Shoe Co., Inc. v. Lewiston-Auburn S.P.A., 320 A.2d 247, 250 (Me.1974).

neither parent has a reason to reside, I respectfully dissent.

According to the Superior Court's order, the primary physical residence of the children is to be with Rowland, so long as she does not relocate to oregon. Rowland has remarried, her new husband lives in Oregon, and naturally Rowland would prefer to live there with him. The Superior Court's order goes on to provide that should Rowland move to Oregon, the children's primary physical residence is to be with Kingman, but only on the condition that he reside in Yarmouth. Kingman owns a home in Winslow. The order results in requiring one of the parents to reside in Yarmouth, a location where, other than to be the

primary physical custodian of the children, neither parent now wants to reside.

Although the current living arrangements of the children and how they adjust to changes in their home, schools, and community, are factors to be considered by the court in determining the best interests of the children, see 19 M.R.S.A. §§ 752(5)(D), (E) & (G) (Supp.1992), those factors must be considered together with all other relevant circumstances, and in the context of the reality of where the parents live and work. In my view, to require that a residence be maintained for the children in Yarmouth, when neither parent has any other reason to reside

there, wastes the parents' resources, contradicts common sense, and constitutes an abuse of discretion.

I would vacate the judgment and remand for the court to reconsider the primary physical residence of the children, along with the parental rights and responsibilities and rights of visitation, in the proper perspective of where the respective parents live and work.

ORDER DENYING RECONSIDERATION,
SEPTEMBER 9, 1993

STATE OF MAINE

SUPREME JUDICIAL COURT
Cumberland, ss. Law Docket
No. Cum-92-525

MARGARET S. ROWLAND,
Plaintiff/Appellant

v. ORDER

ROBERT E. KINGMAN,
Defendant/Appellee

Upon the motions of Appellant for reconsideration and for stay of the mandate, it is ORDERED that the motions be, and they hereby are DENIED.

The mandate shall issue forthwith.

Date: September 9, 1993

/s/ Caroline D. Glassen
Justice, Supreme Judicial Court

## II. SUPERIOR COURT FOR CUMBERLAND COUNTY

DIVORCE JUDGMENT

STATE OF MAINE CUMBERLAND, ss. SUPERIOR COURT Civil Action Docket No. CV-89-1047

| | | |
|---|---|---|
| MARGARET S. ROWLAND, Plaintiff | ) | |
| | ) | DIVORCE |
| vs. | ) | JUDGMENT |
| | ) | |
| ROBERT E. KINGMAN, Defendant | ) | |

Notice of the pendency of the Complaint in this cause of divorce has been duly given according to law. This cause having been heard and the evidence fully presented and considered, a divorce from the bonds of matrimony is hereby ORDERED AND ADJUDGED between the parties on the Complaint of the Plaintiff for the

cause of irreconcilable differences. It is further ORDERED AND ADJUDGED that the parties shall have shared parental rights and responsibilities for their minor children, Edwin R. Kingman (D.O.B. 1/13/83) and Meagan R. Kingman (D.O.B. 4/17/85) whose primary residence shall be with the Plaintiff. The Defendant shall have the right to visit with and be visited by said minor children at such reasonable times as may be agreed upon by the parties in advance.

In accordance with 19 M.R.S. 316(6) the Court has made certain findings of fact concerning the current parental support obligation. Those findings are contained within the completed child support worksheet

which is attached hereto and incorporated herein.

The Defendant is ordered to pay to the Plaintiff the sum of $69.24 per week payable monthly ($300 per month) toward the support of the following children:

Edwin R. Kingman (D.O.B. 1/13/83)

Meagan R. Kingman (D.O.B. 4/17/85)

Further, that the Plaintiff shall be obligated to pay the remaining portion of the parental support obligation. The payments are to start on the first day of the first month following the date of this Divorce Judgment. The Court finds that the components of the parental support obligation are as follows:

| | |
|---|---|
| Basic support entitlement | $310 |
| Child care expenses | -0- |
| Extraordinary medical expenses | -0- |

It is ORDERED that the support obligation for each child shall continue until that child graduates, withdraws or is expelled from secondary school as defined in Title 20-A, Section 1, or attains the age of 19 years, whichever first occurs after the child attains the age of 18 years.

The Court further ORDERS the Defendant to maintain health insurance for the benefit of the minor children if it is available through employment or at a reasonable cost. It is further ORDERED that nonrecurring extraordinary medical expenses for the children are to be shared in the

following manner: 70% by the Plaintiff and 30% by the Defendant.

The Conditional Withholding Order attached to this judgment is incorporated herein. It is further ORDERED that this judgment be noted upon the docket by incorporation by reference pursuant to M.R.Civ.P 79(1); further that the Settlement Agreement of the parties dated May 16, 1991 is incorporated herein.

Dated: 5/16/91 /s/ Roland Beaudoin
Justice
Superior Court

GUARDIAN'S REPORT (EXCERPTS),
AUGUST 1992

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August 10, 1992

The Honorable Roland Beaudoin
**MAINE SUPERIOR COURT**
Cumberland County Courthouse
142 Federal Street
Portland, Maine 04112

RE: **Rowland v. Kingman**
**Docket Number: CV-89-1047**

Your Honor:

As the record will reflect, I was appointed by the Court on 6/3/92 to serve as Guardian Ad Litem for Edwin and Meagan Kingman. In compliance with that Order, the following written information is provided to the Court

in order to assist the Court in determining the best interests of the children.

**PROCEDURE**:

In evaluating this case for the Court, multiple interviews were conducted with the children and each of their parents. In addition, information was collected from the daycare provider, the mother's new husband, the father's current partner, all of the children's primary school teachers, the primary school guidance counselor, the personal psychotherapists of each parent, the marital therapist seen by the parents prior to their marital separation, and several acquaintances of the parents and/or children.

**FAMILY AND PARENTING HISTORY**:

The parents reportedly met in 1976. The mother was then a medical student at the University of Cincinnati. The father was living in Massachusetts and working as a . . .

* * *

children's point of view is the continuity which is provided in terms of their relationship with their father and also their relationship with their home, school and peers. The largest disadvantage to the children of the current arrangements is that they reside primarily in a single parent household. Single parent households tend to be more stressful on both children and the residential parent, especially when

that parent is also working a busy schedule. The mother in this case has done a very good job in coping with the difficulties of this situation and has been greatly assisted by the identification and employment of a highly competent babysitter. Nonetheless, both the children and the mother do make comments which are consistent with the types of pressures and disadvantages which are common to a single parent home.

There is an issue in the current case as to whether or not the current living arrangements can be maintained. The mother has taken a number of steps in anticipation of relocating to Oregon including terminating her practice as a physician, and putting

the house on the market. If the Court were to determine that the children were to stay in Maine, and the mother chose to remain with the children, she would have to reconstitute some of the former living situation which has been dismantled in anticipation of the move. It is assumed, given the mother's professional credentials, that she would be able to find employment once again or restart a new practice, and as of the date of this report the house has not yet been sold. The mother has raised a number of concerns in this area, however, and thus it is not completely clear at this point in time as to whether the current arrangements can be maintained. The father has indicated

that he would be willing to relocate to Yarmouth if this would assist in maintaining the current arrangements.

Some minor changes in the current arrangement would be helpful if the current arrangements are to be maintained. The parents would benefit from better definition of boundaries and protocols and the children would benefit from the elimination of the 1.25 hour commute on school nights to and from their father's home in Winslow. The father has discussed obtaining an apartment in Yarmouth to use as a base for visitation and in the event that he did so there would be no objection to continuing these elements of the current arrangements. The only objection is the length of

commute imposed on a school night.

**E. Stability of the proposed living arrangements**

The mother's proposal is to move the children to Oregon where they will reside with herself and her new husband. This appears to be a stable plan. The mother has purchased a home in Oregon with her new husband. He is currently employed at a significant salary. The mother has obtained employment for herself on a part time basis as a contract physician. The step-father has lived in the Oregon community for approximately 10 years and therefore has roots in that community which can serve as a bridge for the children. The mother's move to Oregon does not appear to be

unplanned, blind or impulsive.

The mother's plan also anticipates that, because she will only work part time, she will be able to be home with the children during the majority of the times when they are not in school. This eliminates the need for any routine day care or babysitting. This is typically seen as a premium when there is a competent and caring parent. In the current case this may be somewhat less of a premium than usual because of the unusual quality of the day care arrangement created by these parents, but the mother's plan in Oregon does have the advantage of creating an at home parent for the children without inducing any significant financial

hardship as a result.

The proposed living arrangements in Oregon do suffer in that they impose upon the children a significant travel burden several times a year in order to fulfill their desire for physical contact with their other parent.

The proposed living arrangement that the children would remain in Yarmouth with the mother is, as noted above, somewhat in flux because of the mother's preparations to move to Oregon. Given her professional skills, however, it would appear reasonable for the Court to assume that she likely would be able to obtain employment once again in this area and once again support herself

and the children in the home community of Yarmouth. The primary negative element of this plan would be that the mother would once again be returned to the role of single parent. This is offset somewhat by the presence of the babysitter, but nonetheless does result in the continuation of a single parent home as the primary residential environment.

The proposed arrangement that the children would move to Winslow with their father does not appear to be a realistic option in this case given the mother's statement that she would remain in Maine if the children remain in Maine and the father's statement that under those circumstances he would agree that the children would

remain with their mother in Yarmouth as their primary residence. Setting this aside, the father does own a residence in Winslow and he is employed. The father's circumstances in Winslow do appear stable and he does appear to have the ability to provide a stable set of living arrangements for the children in that community.

Alternately, the father has discussed moving to Yarmouth in order to provide the children with a primary residence in that community. The father appears to have the ability to in fact obtain a residence but this plan appears to have the disadvantage of a lengthy commute for the father to and from his place of employment.

This might be offset to some degree by the ability to continue to employ the babysitter. The plans for residence with the father in Yarmouth are quite vague, however.

The overall data in the case suggests that either of these parents will be able to create a stable living arrangement for the children once the Court has determined the issues of custody and residence.

**F. The motivation of the parties involved and their capacities to give the child love, affection and guidance**

The data in the case suggests no difficulties in the area of love, affection or guidance as regards either parent. These parents have significantly different styles and values, both as parents and as adults,

but both show a strong and genuine sense of love and affection for their children, and both appear to be well within the average range in their capacities to provide the children with appropriate guidance as they grow and develop.

The motivations underlying the desire to relocate in this case do not appear to be malicious, vengeful or impulsive. The mother and her new husband do appear to have made a genuine effort to attempt to remain in this area by having the husband relocate to Yarmouth. The primary obstacle in this appears to have been the inability of the new husband to obtain employment in this area. The information made available to the

Guardian suggests that a good faith effort to find employment was made, although the Court obviously must ultimately determine whether the efforts made were sufficient to qualify as good faith.

The reasons given for relocation in this case appear to revolve mostly around adult concerns and considerations such as a new marriage, desired employment and a desired life style. These arrangements do impact positively on the children in some ways, such as in the ability to have an at home parent, but the bulk of the motivations to relocate do not appear to involve issues that are inherent to the children, such as any special needs for medical care or education,

and appear to reflect mostly issues of changes of circumstance in post-divorce adult lives.

**G. The children's adjustment to the children's present home, school and community.**

The children's adjustment to their present home, school and community is currently good. This reflects well on the parents who have worked hard to create this positive adjustment. The children enjoy their community, their school and their friends. They report feeling secure and comfortable in their current environment and report no desire to leave.

This present positive adjustment was apparently particularly hard won for Eddie, who had significant

problems earlier in school. He appears now to have made the adjustment and to be doing significantly better. He is the child about whom there are the most concerns as to how he will be able to readjust if he is relocated. Eddie in general a relatively introverted and shy child. He tends to have a greater difficulty with change than the hypothetical average child whereas Meagan, his sister, appears to be more robust in this area and likely to have somewhat less difficulty with change than the hypothetical average child. This is not to state that Meagan might not have adjustment difficulties if relocated, particularly revolving around the loss of her father, but she

does appear to be constitutionally better equipped to cope with these difficulties than does Eddie.

**H. The capacity of each parent to allow and encourage frequent and continuing contact between the child and the other parent including physical access.**

The children have been having ongoing visitation with their father since the marital separation. To the extent that occurrence is the best measure of capacity, the parents seem to have demonstrated capacity to this extent.

There is clearly friction around the area of visitation between these two parents. The mother tends to communicate concerns about what she views as the father's encroachment or intrusion and requests greater

definition of boundaries. The father's complaints revolve mostly around feeling a lack of access and flexibility on the part of the mother, although he now also has come to request greater definition of boundaries as well.

Some of this friction seen between the parents appears to reflect the typical residential versus visiting parent's views on the visitation situation. Typically residential parents are more likely to complain about issues of intrusion whereas visiting parents are more likely to voice complaints about lack of access. Some of the difficulty in this particular case also reflects continuing antipathy between the

adults as the conflicts which resulted in the end of this marriage still can be seen in the parents interactions with each other.

In general, however, both of these parents appear likely to obey whatever the Court Order is regarding visits and . . .

**DISCUSSION AND RECOMMENDATIONS**:

This case is rendered difficult for the Court by the fact that the children have very strong, positive, loving bonds with both parents and both parents reciprocate these. Both of these parents, despite their differences with each other, have genuine and substantial feelings for their children and a desire to remain involved in their lives.

After weighing all of the data in this case, the primary differentiating focus appears to resolve around the advantage to the children of having a two parent home in which the mother is largely available during those times when the children are not in school, versus having a set of living arrangements in which the children can have continuing and frequent physical access to the father. The living arrangements proposed by the mother in Oregon appear to be ones which would be stable and which would provide the children with a parent who would be available to them during the majority of non-school hours. This is clearly an asset to the children, notwithstanding the excellence of the

babysitting arrangement which they currently have in Yarmouth.

On the other hand, attaining this arrangement for the children would be at the cost of the comfortable, frequent and continuing access which they now have to their father, the imposition of a substantial travel burden onto the children, and the disruption of their current lives. Eddie and Meagan are basically accustomed to seeing each of their parents during any given week and do not routinely go more than several days without some type of physical contact with each parent. Relocation to Oregon would create a situation in which the children would regularly experience relatively long periods of

time without physical contact with one parent or the other and this would be a dramatic and undesired change for the children. The quality of the father's involvement in the children's lives would also change as he would be less available to understand and interact with the children's lives on an ongoing basis.

The weight of the information in this case indicates that the children gain the most and lose the least by a plan which would maintain their primary residence in their home community of Yarmouth with their mother and provide frequent and ongoing visitation with their father if this could be accomplished without losing the stability of the mother's

home. The successful relocation of the step-father to Yarmouth would preserve for the children the current arrangements which are working well for them and also eliminate the primary negative element of the current arrangements, i.e., the fact that the primary residence is a single parent household. It would also avoid the imposition of a travel burden on the children, and generally minimize the disruption of their lives as a result of their mother's new marriage.

The problem with this plan, however, is the unknown duration and level of the instability which would accompany the lack of employment of both the mother and step-father, given that the mother has closed her

practice in Maine in anticipation of moving and the step-father has been unsuccessful in his job search. Remaining in Maine would involve exchanging the stability offered by two jobs with a substantial combined income for immediate unemployment and uncertain future employment of each adult. The possible duration of unemployment for the adults is unknown and yet is a key factor in assessing the cost/benefit ratio to the children of staying verses going as the shorter the period of unemployment, the more acceptable this cost when compared to the long term changes for the children entailed in moving to Oregon. While the mother and step-father each has solid professional credentials and the

mother apparently has a population of patients who might return to her for medical care, her practice is closed, the step-father's job search in this area has been unsuccessful and the children would experience whatever period of financial instability which would occur until the adults secured employment. Further the mother's plan to work part time and be home with the children would, at best, be delayed.

Relocation by the new husband has apparently been seriously considered and pursued, although obviously whether sufficient attempts have been made in this area is for the Court to determine. Relocation by the new husband does not appear to have been impeded by the costs to him of leaving

his home, friends, community or current job. He appears to have been willing to bear each of these if acceptable employment could have been located here. The major impediment appears to be the desire not to move to Maine without any suitable employment, and without any way to be the primary wage-earner such that the mother could pursue a part-time work schedule which would leave her home with the children.1 Whether this is sufficient impediment is for the Court to decide, but it does appear to underlie the current request to relocate the children to Oregon which is before the Court.

Given the choice between the children living in Oregon with the

mother or Winslow with the father, the recommendation would be that the children be relocated to Oregon with the mother. This is made on the basis that either of these scenarios would involve uprooting the children from their home community and the only issue of continuity which distinguishes the two proposals would be the continuity with the mother as the primary residential parent. While the father is clearly capable of providing a primary residence for his children and acting in that regard, the continuity of the current arrangements would favor the children remaining with the mother as the primary custodial parent.

Given the option of the mother remaining in Yarmouth with the children versus the children moving to Winslow with the father, the data would again favor continuation of primary residence with the mother in Yarmouth, assuming the mother was able to find employment within a reasonable period. The relocation to Winslow would obviously disrupt the children's current community adjustment, as well as the continuity of their primary residence with the mother.

Relocation within Yarmouth to primary residence with the father, if the mother was still remaining in the community, would appear to unnecessarily disrupt the children's lives, assuming she was able to find

employment within a reasonable period.

The choice of relocating to Oregon with the mother versus remaining in Yarmouth with the father provides perhaps the most difficult choice for the Court in this case. This is the choice which squarely places the contest between the impact of losing the mother as the primary residential parent, versus the impact of losing an easily accessed relationship with the father and the current adjustment to home, school and community. The data on the father clearly suggests that he could perform in the role of primary residential parent and placement with the father in Yarmouth would have the added advantage of retaining the community

roots, but this question really is one with no clear answer as the loss to the children of the primary relationship with the mother would indeed be very difficult.

The option of Oregon with the mother versus Yarmouth with the father is also apparently a straw man as the mother has indicated that she would remain in Maine with the children if they were to stay in Yarmouth, thus rendering the effective pragmatic choice in this case that between relocation to Oregon with the mother versus remaining in Yarmouth with the mother, as discussed above.

**SUGGESTED VISITATION ARRANGEMENTS**:

In the event that the Court approves the relocation to Oregon, the

suggestion of the Guardian is that the children reside in Oregon with their mother during the school year and return to the father's home in Maine for the summer school holidays. The children should return to Oregon one week prior to the onset of school in order to . . .